

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,	:	
-vs.-	:	
Commonwealth Edison Company,	:	
	:	01-0078
Complaint regarding wrongful refusal to	:	
Provide customer specific transition	:	
Charges.	:	

COMMONWEALTH EDISON
COMPANY'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

I. PROCEDURAL HISTORY

On January 30, 2001, the Illinois Bell Telephone Company ("IBT") filed a complaint pursuant to Section 10-108¹ of the Public Utilities Act ("the Act") against the Commonwealth Edison Company ("ComEd"). The Complaint alleges that ComEd violated sections 9-240, 9-241, 9-250 and 9-252² of the Act by failing to comply with a ComEd tariff, by unreasonably discriminating against IBT, and by charging IBT unjust and unreasonable rates for electric service. In particular, IBT alleges that ComEd illegally refused to provide it with customer-specific transition charges ("CTCs") for each of 126 IBT facilities purportedly governed by a contract between the two companies. IBT claims that ComEd's refusal to provide customer-specific CTCs prevented IBT from determining, for each facility, whether to remain on ComEd's bundled rates or to take service on an unbundled basis. IBT seeks damages based on its payment of allegedly higher charges from December 1999 to the present.

On March 20, 2001, ComEd filed its Answer and affirmative defenses, denying the substance of IBT's Complaint and urging rejection of IBT's requests for relief.

Pursuant to proper legal notice, hearings were held in the Chicago offices of the Commission before a duly authorized Administrative Law Judge ("ALJ") on February 27, 2001, May 1, 2001, July 12, 2001, September 6, 2001, January 23, 2002, May 16-17, 2002 and June 17, 2002. The evidentiary record was marked "Heard and Taken" at the end of the June 17, 2002 hearing.

¹ 220 ILCS 5/10-108.

² 220 ILCS 5/9-240, 9-241, 9-250 and 9-252, respectively.

IBT and ComEd were represented at each of the foregoing hearings by legal counsel. During the May 16-17, 2002 hearings, IBT presented documentary exhibits and the testimony of Mr. John Ragland and Mr. Paul E. Stack, while ComEd presented documentary exhibits and the testimony of Mr. William J. Voller, Mr. John Leick, Mr. David F. Geraghty, Mr. Delso Hudson and Mr. Paul R. Crumrine. The parties also presented five Joint Exhibits.

IBT filed its initial Brief ("Init. Br.") on July 15, 2002. ComEd filed its Response Brief ("Response Br.") on September 6, 2002. IBT filed its Reply Brief ("Reply Br.") on October 18, 2002.

An ALJ's Proposed Order was served on the parties on March 13, 2003. The parties filed their Briefs on Exceptions ("BOEs") on March 31, 2003 and their Reply Briefs on Exceptions ("RBOEs") on ____, 2003.

II. ANALYSIS AND CONCLUSIONS

A. Background and Positions of the Parties

Subsection 16-108(a)³ of the Act requires electric utilities to offer delivery services to non-residential customers. Delivery services are the means by which electric power is delivered to customers qualified to use such services. 220 ILCS 5/16-102. A delivery services customer can elect to receive electric power from either the utility providing delivering services (here, ComEd) or from another power supplier. 220 ILCS 5/16-110. In either case, however, a delivery services customer must pay to the delivery services provider any transition charge (denominated a "customer transition charge" or "CTC" in ComEd's tariff⁴) imposed by the delivery services provider⁵.

ComEd's Rate CTC tariff states that: "With the exception of retail customers that have entered into contracts with [ComEd] which provide payment of customer-specific CTCs as described in the Charges section of this tariff, CTCs shall be determined for a retail customer based upon the CTC Customer Class applicable to the retail customer."⁶ The CTC tariff then sets out both the quantitative and qualitative parameters that determine a customer's class, and a formula for calculating the CTC for customers in each such class. Thus, as a general rule, the customer's CTC is established solely by reference to the customer's class.

Nonetheless, as the CTC tariff states, some customers are eligible for a customer-specific CTC. "Each such retail customer shall be treated as a separate CTC

³ 220 ILCS 5/16-108(a).

⁴ Joint Ex. 2, Ill. C.C. No. 4, Original Sheet No. 134.

⁵ A utility may, but is not required to, impose such transition charges in connection with delivery services. 220 ILCS 5/16-108(f).

⁶ Citation in footnote 4, above.

customer class.”⁷ Among other categories not pertinent here, “[c]ustomer-specific CTCs shall be calculated for any non-residential retail customer...(iii) that had been taking service under the following tariffs during the year preceding the original effective date of the tariff [including]...Customer-Specific Electric Service Contracts.”⁸ Consequently, the principal issue in this proceeding is whether IBT was taking service during the relevant time period under a customer-specific electric service contract (“CSESC”). If so, IBT would be entitled to customer-specific, rather than class-based, CTCs for IBT facilities served under the contract.

The contract that IBT asserts is a CSESC is entitled “Electric Service Contract” (“Contract”) and was executed by IBT and ComEd on July 8, 1997⁹. Joint Ex. 1. The Contract contemplates that ComEd will provide electricity to designated IBT facilities. It combines the obligations of certain ComEd tariffs, including Rate 6, 6L and Rider 32, with provisions that do not appear in those tariffs. IBT Ex. 1.1 at 6-7. For example, Rider 32 reduces ComEd’s peak summer system load by offering annual payments to customers that agree to curtail electric load upon notice from ComEd. Joint Ex. 3, Sheet No. 95.09.6. The Contract modifies Rider 32 to make curtailment available to IBT locations that receive service under Rate 6 (General Service). ComEd Ex. 3.0 at 7. Rider 32 is ordinarily unavailable to Rate 6 locations (but is available for service provided under Rate 6L or Rider CB). Joint Ex. 3, Sheet No. 95.09.6.

ComEd filed the Contract for Commission approval on July 18, 1997, and the Commission accepted that filing without suspension on August 27, 1997. IBT Ex. 1.0 at 10. The Contract became effective on September 2, 1997 and remained in effect through December 31, 2002¹⁰. Joint Ex. 1.

Based on its view that the Contract is a CSESC within the meaning of ComEd’s Rate CTC tariff, IBT asked ComEd, in a letter dated November 1, 1999, to provide customer-specific CTCs for each of the facilities served under the Contract. Joint Ex. 4. In responsive correspondence dated November 3, 1999, ComEd stated that it was “not appropriate” to provide customer-specific CTCs for the subject facilities because the charges for electric service under the Contract were not “customer-specific,” but were “those paid by any customer electing the same electric service rates.” Joint Ex. 5. Accordingly, ComEd advised IBT that “except for those Ameritech accounts that qualify for customer-specific CTCs by virtue of meeting the 3000 kW criterion [a separate basis

⁷ *Id.*, Original Sheet 137.

⁸ *Id.*

⁹ The Contract contains three exhibits, one identifying the original facilities served under the Contract, one describing charges for facilities rental service (Rider 6), and one describing charges for meter lease service (Rider 7).

¹⁰ Since the Contract has already expired, part of IBT’s prayer for relief (“require ComEd to begin billing [IBT] according to such customer-specific CTC calculations” (Complaint at 12)) has become moot. Nonetheless, the principles and conclusions set forth in this Order will determine the outcome of IBT’s request for reparations, as well as affecting the future conduct of these parties, and similarly situated providers and customers, in matters under our jurisdiction.

for obtaining a customer-specific CTC under Rate CTC]" the IBT facilities then subject to the Contract could only receive customer class CTCs¹¹. *Id.* In subsequent meetings between IBT and ComEd personnel, neither party altered its position with regard to the appropriate CTCs for facilities served under the Contract. IBT Ex. 1.0 at 11-12; ComEd Ex. 1.0 at 6-7.

ComEd avers that its refusal to calculate customer-specific CTCs for the facilities served under the Contract is grounded in a written policy developed by ComEd. That policy was circulated for discussion within ComEd on September 28, 1999, ComEd Cross-Ex. 5, and is neither included nor referred to in ComEd's Rate CTC, which was filed on September 7, 1999. Joint Ex. 2. "The Policy concludes that those contracts that would be entitled to customer specific CTC calculations were those 'special negotiated' contracts that involved 'reduced price electric service' [under prices] other than those contained in ComEd's base rates¹². ComEd Response Br. at 13. Contracts providing for Rider 32-type curtailment payments (like the Contract here) would not provide a basis for customer-specific CTCs, because ComEd's policy does not regard such payments as discounts from base rates.

IBT wants customer-specific CTCs calculated for its facilities because, in its view, the "economic attractiveness of a customer's market-based options...is substantially dependent on calculation of the CTC." Complaint, at 3. Therefore, IBT requests that we order ComEd to retroactively calculate customer-specific CTCs for each of the IBT facilities subject to the Contract. IBT would then compare those customer-specific CTCs with the class CTCs that ComEd would otherwise have applied to those facilities. *Id.*, at 12. Whenever customer-specific CTCs would have been lower than customer class CTCs, and whenever that monetary difference would have made it less expensive for IBT to take unbundled services, rather than the bundled services specifically identified in the Contract, IBT maintains that it would have chosen unbundled services and saved money. IBT Ex. 1.1 at 17-18; Tr. 253-54. IBT characterizes this as an "optimization" strategy. IBT Init. Br. at 21. IBT now requests that we order ComEd to pay those unrealized savings (aggregated from December 1999 through December 2002) to IBT as reparations. *Id.*

¹¹ ComEd did provide a customer-specific CTC for accounts at two Ameritech Illinois facilities (2000 West Ameritech Center and 225 W. Randolph in Chicago) because those locations each had a demand of at least 3 MW. Tr. 231-32.

¹² "Base rates' means the rates for those tariffed services that the electric utility is required to offer pursuant to subsection (a) of Section 16-103 and that were identified in a rate order for the collection of the electric utility's base rate requirement...." 220 ILCS 5/16-102. Subsection 16-103(a) requires an electric utility to "continue offering to retail customers each tariffed service that it offered as a distinct and identifiable service on the effective date of this Amendatory Act of 1997...." 220 ILCS 5/16-103(a). Thus, base rates are tariffed (i.e., standardized and non-negotiated) rates. Base rates are utilized in the formula for calculating customer-class CTCs in Rate CTC. Joint Ex. 2.

B. Statutory Bases for the Complaint

As noted previously, IBT asserts that ComEd's refusal to provide customer-specific CTCs contravenes several sections of the PUA. First, IBT cites Section 9-240, which prohibits a public utility from imposing rates, terms or conditions other than those appearing in its tariffed rates. IBT's theory is that ComEd is deviating from the terms of its Rate CTC by refusing to treat the Contract as a CSESC, within the meaning of that tariff.

Second, IBT charges ComEd with violation of Section 9-241, which bars a utility from "subject[ing] any corporation or person to any prejudice or disadvantage." In IBT's view, ComEd is treating IBT differently than it is treating other ComEd customers with CSESCs, thereby prejudicing IBT.

Third, IBT relies on Section 9-250, which provides that upon finding that a utility's charges are "unjust, unreasonable, discriminatory or preferential," the Commission shall determine the charges "to be thereafter observed and in force." We note here that since the Contract has already expired, we cannot now establish the charges that must be observed under the Contract on a forward-looking basis.

Fourth, IBT invokes Section 9-252, which authorizes the Commission to require a public utility to make "due reparations" when it has "charged an excessive or unjustly discriminatory amount for its product." IBT contends that the charges that ComEd imposed on IBT under the Contract were excessive and unjustly discriminatory because they did not reflect IBT's view that the Contract was a CSESC, which would have allegedly entitled IBT to utilize unbundled services at prices based on customer-specific CTCs.

C. Is the Contract a CSESC?

The phrase "customer-specific electric service contract" is not defined in the Rate CTC tariff and neither party suggests that it is defined elsewhere in ComEd's tariffs. According to IBT, when a tariff does not define a particular term, that term "must take on its generally understood and accepted meaning." IBT Init. Br. at 16, citing Couzens Warehouse & Distributors, Inc. v. Fred Olson Motor Service Co., 544 F.2d 919, 921 (7th Cir. 1976) (collecting cases), and Illinois Telephone Association v. Illinois Commerce Commission, 67 Ill.2d 15, 20, 364 N.E.2d 63, 64 (1977) (holding that statutory language should generally be given its ordinary meaning).

However, ComEd draws a different conclusion from the fact that the term "customer-specific electric service contract" is not defined in the Rate CTC tariff: that "the proper meaning of the term is uncertain on the face of the Rate." ComEd Response Br. at 17. Accordingly, ComEd emphasizes, "Illinois law provides that when the meaning of a tariff term is uncertain or 'ambiguous,' the term should be construed in light of the meaning that it was intended to have when the tariff was prepared." *Id.*, citing Moncada v. Illinois Commerce Commission, 212 Ill. App. 3d 1046, 571 N.E.2d

1004 (1991); General Mills v. Illinois Commerce Commission, 201 Ill. App. 3d 715, 559 N.E.2d 225 (1990).

In view of the foregoing disagreement, our threshold task is to identify the correct interpretive framework when a tariffed term is undefined within the tariff¹³. Initially, we do not concur with ComEd that a tariff term is necessarily uncertain or ambiguous because it is undefined. ^

^We conclude that the correct interpretive framework for construing "customer specific electric service contract" in Rate CTC is ^to ^construe the term in light of the controlling provisions of the Act. As language^ in a tariff of a regulated electric utility^, ^"customer specific electric service contract" must be interpreted in a ^manner appropriate to that context and ^consistent with the substantive rules that govern that context. The substantive rule that controls the interpretation of "customer specific electric service contract" is section 16-102 which governs the determination of "transition charges" like ComEd's CTCs at issue here.

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^Under section 16-102 of the Act, "transition charges" like ComEd's CTCs, are calculated in a non-class or, in the terms of ^the ^Rate CTC tariff, "customer^ specific^" manner, if a customer has entered into a contract with a utility that contains "contract rates.^" This is clear from section 16-102 of the ^Act, which states that one of ^the ^factors used in calculating "transition charges" is the ^amount of revenue generated by a customer or customer class based on either "base rates" during a specific period or "to the extent applicable, contract rates." 220 ILCS 5/16-102. If "transition charges" are to be calculated based on anything other than "base rates" used in determining class "transition charges," they must be calculated based on "contract rates" found in contracts between a customer and a utility.

^We hold that under section 16-102 of the ^Act, "customer^ specific electric service contracts" in ComEd's Rate CTC are those contracts that contain "contract^

¹³ The Commission observes that CGH Medical Center v. Commonwealth Edison Company, Dckt. 96-0086, Order, Jan. 22, 1998, cited by *both* parties (IBT Init Br. at 20, ComEd Response Br. at 19), does not materially assist either side. In that proceeding, we expressly relied upon the plain meaning of the subject tariff, but also discussed ComEd's intention when drafting that tariff, and its "fundamental economic purpose." We did not make a threshold assessment of whether the pertinent language in the tariff was ambiguous.

rates^." IBT's Contract with ComEd ^does not contain "contract rates" and therefore is not a "customer specific electric service contract^." Instead, section 1.3(a) of the Contract specifies ComEd's base rates and riders that would apply to the service provided thereunder. (Contract sec. 1.3(a)).^ The Contract contains no provisions stating that these rates would be discounted or that an individually negotiated "contract rate" was applicable.

^The Contract does provide that IBT would receive certain credits under ComEd's ^Rider 32 in exchange for its agreement to "curtail" certain "electric load" at ComEd's request. (Contract, Joint Ex. 1, p. 1). These "credits," however, do not amount to a "contract^ rate" for the electricity that ^ComEd supplied. Instead, ComEd offered such credits in exchange for IBT's agreement not to use electricity. They do not represent discount from the ^rate IBT paid ComEd for electricity. As ComEd correctly noted in its policy concerning the implementation of Rate CTC, curtailment payments are "demand side resources to be acquired by the Company from customers," and ^"are separate from the amounts to be paid by the^ customer for the ^power and energy supplied" (ComEd Cross-Exam. Ex. 5, p. CE 0262). These payments thus do not constitute a "contract rate" for the supply of electricity that differs from ComEd's base rates.

^We are also mindful that ComEd drafted Rate CTC ^in order to implement section 16-102 of the Act. The undisputed evidence shows that ComEd drafted Rate CTC so that contracts containing "contract rates" would be the basis for "customer specific" CTCs under the Rate. ComEd's personnel who drafted Rate CTC testified that the term "customer specific electric service contract" was added to the Rate in order to ensure that ComEd's contracts that contained "contract rates" would be treated in a ^manner consistent with the Act. Such "customer specific electric service contracts" were those where ComEd had "individually negotiate[d] a contract rate with certain customers that had a proven, viable alternative to obtaining their electricity from ^ComEd." (ComEd Response Br. at 10). "Contract rates" negotiated in these circumstances were at discounts from ComEd's otherwise applicable base rates.

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Because IBT's Contract does not contain "contract rates," we hold that it is not a "customer specific electric service contract" under Rate CTC. As a result, we also hold that IBT is not entitled to "customer specific" CTCs for the locations covered by the ^Contract. Our holdings are based on section 16-102 of the Act, and ^our judgment of how the term "customer specific electric service contract" should be construed to implement the ^requirements of ^that section.

^IBT argues that ComEd should have included a definition of the term "customer specific electric service contract" in Rate CTC. While a definition might have rendered this proceeding unnecessary, we find this argument ultimately unpersuasive. Section 16-102 of the Act provides adequate guidance concerning the ^meaning of the term

and, as[^] discussed herein, [^]makes it clear that "contract rates" are necessary for a contract to meet this definition.[^]

More specifically, IBT claims that portions of ComEd's policy which stated that contracts that provided for curtailment payments (like its own) are not "customer specific electric service contracts" should have been included in the text of the Rate. In this regard, we note only a very limited number of contracts like IBT's existed.¹⁴ The Commission acknowledges ComEd's valid assertion that "[r]ates cannot address each and every situation that will arise." ComEd Response Br. at 28. We agree that tariffs can become unwieldy when a utility attempts to anticipate every conceivable contingency. [^]Given the small number of contracts like IBT's, [^]we find that it is understandable that the Rate did not [^]specifically [^]address how these contracts [^]would be [^]treated. It [^]is also understandable that[^] this [^]issue would [^]be addressed in ComEd's policy that [^]was prepared when the Rate [^]was to be implemented, but not in the Rate itself.

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D. Can IBT use a CTC under the Contract?

[^]Even if IBT were able to establish that the Contract has the attributes of a CSESC within the meaning of ComEd's Rate CTC, that [^]alone would not [^]entitle IBT to the [^]recovery of [^]reparations from ComEd. To recover, IBT would [^]also [^]need to [^]show that it could have received delivery services at the Contract [^]locations. [^]If IBT [^]were not eligible to receive delivery services at these locations, it would not have been able to achieve any savings based on "customer[^] specific" CTCs[^], even if they were available.

IBT asserts that the Contract does permit it to take electric service at the pertinent facilities under Rate RCDS and Rider PPO. It contends that it "would not breach the Contract by simply switching a particular facility from bundled service to Rider PPO. The facility would still be taking service from ComEd as required by § 1.1(d) of the Contract, and thus would not breach the Contract by doing so." IBT Reply Br. at 25. Thus, in IBT's view, facilities receiving unbundled services (under Rate RCDS and Rider PPO) would remain subject to the Contract and, along with facilities receiving bundled services (under Rates 6 and 6L), would be eligible for curtailment payments under Rider 32 (as modified by the Contract). IBT's decision to receive bundled or unbundled electricity at a given facility would depend on the relative cost of those options (calculated with a customer-specific CTC). But, irrespective of which alternative IBT selected, IBT's theory is that the facility would remain under the Contract.

¹⁴ ComEd identifies four contracts with such provisions. Tr. 386 (Geraghty). They involve large commercial customers. *Id.*, at 387 (proprietary).

ComEd responds, *inter alia*, that: "had Ameritech become a delivery services customer at the Contract locations, it would not have received the curtailment payments under the Contract that were made after December, 1999. It also would have been required to refund certain of the prior curtailment payments that it had received. When these factors are taken into consideration, they swallow up any 'savings' that Ameritech would have received had it received delivery services with customer specific CTCs after December, 1999 instead of ComEd's bundled service." ComEd Response Br. at 34. ComEd is essentially arguing that IBT's "optimization" scheme would have terminated the Contract after December 1999, thereby nullifying the curtailment payments IBT actually received under the Contract after that date, and requiring reimbursement of a portion of the payments made before that date (as set forth in section 2 of the Contract).

The parties' focus on "termination" and "breach" of the Contract is a distraction from the central issue here. Termination is a possible, but not inevitable, result of IBT's choice to receive unbundled services at Contract facilities. This is because IBT's obligation under the Contract is to make a sufficient number of its facilities subject to the Contract so that at least 5300 kilowatts of IBT load can be curtailed at ComEd's request. Joint Ex. 1, Recital 2. No specific IBT facility has to be included in the Contract. Indeed, the Contract explicitly provides that the list of locations subject to the Contract can be amended "to add or delete locations," upon written notice to ComEd. *Id.*, Ex. A. Therefore, the receipt of unbundled services at a particular IBT facility (or at several facilities) would not cause termination of the Contract, unless unbundled services *are not allowed for facilities subject to the Contract* and IBT's use of such services caused its aggregate load available for curtailment to drop below the 5300-kilowatt minimum (as described in subsection 2(a)(iii) of the Contract).

Therefore, the parties' discussion of termination begs the fundamental question of whether the Contract permits IBT to use unbundled services at a Contract location. Under the Contract, electric load for the facilities subject to the Contract must be purchased under subsection 1.3(a), which states:

Customer will receive and pay for electric service under (i) this Contract, (ii) Rate 6 or 6L, as applicable, (iii) Rider 32, (iv) Riders No. 6 (attached as Exhibit B), 7 (attached as Exhibit C), 16, 20, 23, 25 (if it is applicable to an individual Premises), 28 and 31, (v) Terms and Conditions, and (vi) any other applicable rates, riders or tariffs, in each case as the items in clauses (i) – (vi) are on file with the Illinois Commerce Commission from time to time and as the same may be added, deleted, modified or amended from time to time.

IBT's view is that the subsection permits it to receive electric service under the subparts of its choosing. By this theory, IBT could choose to be subject to only the curtailment provisions of Rider 32 (subpart iii) and "any other applicable rates, riders or

tariffs" (subpart vi). IBT Init. Br. at 29-30. Since delivery services and ComEd's unbundled energy are offered under, respectively, Rate RCDS and Rider PPO, IBT avers that they are among the "other applicable rates" contemplated by subpart (vi). Thus, IBT could receive electric load at some or all of its Contract locations via delivery service, and that load would be counted towards IBT's 5300-kilowatt curtailment minimum. In short, IBT's position is that the Contract contemplates the receipt of electric service under either, or both, bundled or unbundled rates (along with Rider 32), at IBT's election.

In contrast, ComEd argues that subsection 1.3(a) permits IBT to take service under "other applicable rates, riders or tariffs" only when IBT "continues to participate in Rider 32 (and, in fact, also continue to receive service under ComEd Rates 6 and 6L)." ComEd Response Br. at 37. According to this position, IBT cannot choose among the subparts of subsection 1.3(a). Instead, it must take bundled electric service under Rate 6 or 6L, subject to the terms of Rider 32, and, implicitly, only those "other applicable rates" that are not incompatible with Rate 6 or 6L and Rider 32. Since, ComEd maintains, delivery services are indeed incompatible with Rate 6 and 6L and Rider 32, they are not available under the contract.

The Commission resolves this issue in ComEd's favor. We find that neither the Contract as a whole nor subsection 1.3(a) authorizes IBT to receive unbundled electric services. The parties entered into the Contract before unbundled services were mandated by the amendments to the Act in December 1997. The clear intention of the parties to the Contract, in July 1997, was to create an IBT-specific Contract that would extend Rider 32 curtailment provisions to facilities receiving bundled service under Rate 6 (along with Rate 6L facilities, which were already eligible for curtailment under Rider 32). Joint Ex. 1, subsection 1.3(b)(ii)(E). Subsection 1.3(a) reflects this intention because it requires IBT to receive electric service subject to Rider 32 (subpart (iii)) and under either Rate 6 or 6L (subpart (ii)).

Given that subsection 1.3(a) also obliges IBT to receive electric service under "other applicable rates" (subpart (vi)), we find that in the event of a conflict between the terms of Rate 6 or 6L and "other applicable rates," Rate 6 or 6L must take precedence. Such conflict in fact exists between Rate 6 and 6L and Rate ^RCDS and Rider PPO. The latter are unbundled electric services and Rate 6 and 6L are bundled electric services. IBT can receive electric power under one or the other, but not both, at a given facility. Because Rates 6 and 6L are essential to the purposes of the Contract, and because they existed when the Contract was created, while Rate ^RCDS and Rider PPO did not, they must prevail. Couching this in the language of the Contract, Rate ^RCDS and Rider PPO are not other "applicable" rates within the meaning of subpart (vi). To be "applicable," other rates must be consistent, rather than incompatible, with

Rates 6 and 6L, as well as Rider 32¹⁵

The foregoing analysis is confirmed by the interplay between the above-quoted subsection 1.3(a), which contemplates the express modification of Rider 32, and subsection 1.3(b)(ii), which states: "Notwithstanding the provisions of the section of Rider 32 entitled 'Service Facilities'...(E) this Contract shall be available to individual Premises served under Rate 6 or 6L." Rider 32 is thus "expressly modified," as contemplated by subsection 1.3(a), to extend curtailment to Rate 6 facilities. Since no other express modification of Rider 32 in subsection 1.3(b) is pertinent to this analysis, the other relevant provisions of Rider 32 remain applicable to the electric service received by IBT under the Contract¹⁶, per subsection 1.3(a). Those provisions do *not* make delivery services customers eligible for curtailment. Thus, under subsection 1.3(a)(iii), IBT must take electric service under Rider 32 as expressly modified to include Rate 6 facilities, while under subsection 1.3(a)(ii), it must take electric service under Rate 6 or Rate 6L.

It follows that IBT could not, under the Contract, have its facilities served under Rate RCDS and Rider PPO. This does not mean that IBT was precluded from exploiting the unbundled services mandated by the amendments to the Act as of December 1997. As noted above, the Contract explicitly provides that the locations subject to the Contract can be changed. As long as IBT met its 5300-kilowatt threshold, it was free to choose which of its facilities¹⁷ would be subject to the Contract, without termination liabilities. However, when a facility is deleted from the Contract, it would cease to be subject to the benefits of that Contract, including eligibility for curtailment payments under Rider 32¹⁸. Indeed, IBT states that "it is not our position that...an

¹⁵ For reasons that are not explained in the record here, facilities served under Rate 6T were also included in the original facilities list attached to the Contract in July 1997. Joint Ex. 1, Ex. A. In IBT's view, this indicates that Contract facilities did not literally have to take service under the tariffs specifically listed in subsection 1.3(a) of the Contract. IBT Reply Br. at 25. While the Commission can only speculate as to why a tariff (6T) that is absent from subsection 1.3(a) nevertheless appears in the original facilities list, that fact does not support IBT's construction of the Contract. Rate 6T is apparently a bundled service tariff, like Rates 6 and 6L. Rather than illogically concluding that its appearance in the facilities list extends the Contract to unbundled services, as IBT suggests, we would simply add it to the enumerated *bundled* services that IBT must utilize (whichever is applicable) pursuant to subpart 1.3(a)(iii).

¹⁶ To be clear, the Commission agrees with IBT that the Contract is "not a Rider 32 contract," IBT Reply Br. at 23-24, which we take to mean that it is not *solely* a Rider 32 contract. Our view is that the Contract is that it incorporates (and, in some instances, modifies) the provisions of Rider 32. It also incorporates the provisions of other documents, principally Rates 6 and 6L.

¹⁷ IBT has approximately 1400 facilities in ComEd's service territory. IBT Ex. 1.0 at 4.

¹⁸ Outside of the Contract, the facility might be independently eligible for curtailment under Rider 32, if it meets the eligibility requirements of that rider (which, unlike the terms of the Contract, do not apply to Rate 6 facilities).

individual facility which had been removed from the contract could then continue to rely on the contract as a basis for receiving a customer-specific CTC for that facility.”¹⁹ Tr. 184.

Therefore, even though IBT could demand that ComEd calculate customer-specific CTCs, because the Contract is a CSESC, IBT could not use those CTCs in connection with delivery services under the Contract. Indeed, IBT could not use *class* CTCs in association with delivery services under the Contract either. The Contract requires IBT to take bundled services at Contract locations, and it modifies Rider 32 to extend curtailment to bundled Rate 6 facilities, but not to facilities taking unbundled service under Rate RCDS and Rider PPO.

For IBT to have derived actual benefit from the ability to demand customer-specific CTCs, ComEd would have had to file, during the effective period of the Contract, “other applicable rates, riders or tariffs” that were consistent with Rate 6 and 6L and Rider 32. In fact, on April 20, 2000, ComEd filed with the Commission its “2000 Load Curtailment Pricing Experiment – Revised” (“Curtailment Experiment”). ComEd Cross-Ex. 8. The Curtailment Experiment, which remained effective throughout the curtailment season in calendar year 2000 (i.e., June through September), was “intended to provide increased choice for customers and facilitate voluntary participation in providing curtailment.” *Id.* at 1. It “includes choices for nonresidential customers from small to the very largest commercial and industrial customers, *whether such customers receive electric service under a bundled tariff or receive electric delivery services pursuant to Rate RCDS.*” *Id.* (emphasis added). More specifically, under the “Energy Based Option (Applicable to Bundled Service and Rate RCDS Customers),” the Curtailment Experiment was available to customers receiving service under Rates 6 and 6L *and* under Rate RCDS and Rider PPO.

If the Curtailment Experiment had been applicable to electric service received under the Contract, it would have enabled IBT to link Rider 32-type curtailment *either* to Rates 6 and 6L bundled services or to Rate RCDS and Rider PPO unbundled services. In effect, the Curtailment Experiment would have provided the flexibility IBT erroneously sees in the Contract as written. However, the Curtailment Experiment states that “[c]urtailment already committed to ComEd under existing tariffs and contracts is not eligible for the [Curtailment Experiment].” *Id.* at 4. Similarly, the Curtailment Experiment might have convinced ComEd to revise Rider 32 to provide curtailment to unbundled services customers, as well as to bundled service customers. But there is nothing in the record to indicate that ComEd revised Rider 32 during the time the Contract was in effect. As a result, an opportunity for IBT to use customer-specific CTCs under the Contract never materialized.

It follows that IBT is not entitled to reparations. The terms of the Contract do not allow IBT to elect unbundled services for facilities subject to the Contract. No subsequent actions by ComEd altered the tariffs identified in the Contract in a manner

¹⁹ The facility might qualify for a customer-specific CTC for some other reason, though. Tr. 184.

that would have permitted IBT to receive, at Contract facilities, unbundled electric services in lieu of bundled services under Rates 6 and 6L, or in conjunction with Rider 32. Therefore, IBT could not have achieved any cost savings under the Contract by choosing unbundled services under rates calculated with customer-specific CTCs.

E. Conclusions

Our analysis of the legal issues presented by this dispute has led us to conclude that IBT is not entitled to relief because: 1) the Contract is not a CSESC; and 2) IBT could not receive delivery services under the Contract and therefore could not receive customer specific CTCs even if the Contract were a CSESC.

Therefore, ComEd has not violated Section 9-240, because it did not “charge, demand, collect or receive a greater or less or different compensation” for electric service than the compensation prescribed by the tariffs identified in the Contract.

ComEd has also not violated Section 9-241 by subjecting IBT to disadvantage and prejudice, insofar as ComEd refused to provide IBT with the CTCs contemplated by Rate CTC for CSESCs.

Because the Contract has expired, the Commission cannot, pursuant to Section 9-250, determine the just and reasonable terms and conditions “to be thereafter observed [by ComEd] and in force”. IBT’s claim that Section 9-250 was violated is therefore moot.

ComEd has not violated Section 9-252 because it has not “charged an excessive or unjustly discriminatory amount” for the electric service provided under the Contract.

Based on the foregoing analysis, the Commission[^] denies the four parts of IBT’s request for relief in the manner set forth below.

First, IBT’s request for a finding that the Contract is a CSESC within the meaning of ComEd’s Rate CTC tariff is denied.

Second, IBT’s request that the Commission require ComEd to provide customer-specific CTCs for the IBT facilities served under the Contract is now moot, because the Contract has run its course. However, in the event the Contract has been extended by the parties (which is not addressed in the present record), we hold that, as a result of our finding that the Contract is not a CSESC, IBT would not be entitled to customer-specific CTCs for Contract facilities.

Third, IBT’s request that we require ComEd to begin billing IBT “according to such customer-specific CTC calculations” is moot. Moreover, even if the parties have extended the Contract, the Contract does not contemplate the provision of unbundled electric services.

Fourth, IBT's request for reparations based on the use of customer-specific CTCs under the Contract is denied. Again, the Contract does not contemplate the provision of unbundled electric services, either with customer-specific CTCs or with customer-class CTCs.

III. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Respondent, Commonwealth Edison Company, is an Illinois corporation engaged in furnishing electric service in Illinois and, as such, is a public utility within the meaning of the PUA;
- (2) the Commission has jurisdiction of the parties hereto and the subject matter hereof;
- (3) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) the Contract between the parties herein, described in the prefatory portion of this Order, is not a customer-specific electric service contract within the meaning of ComEd's Rate CTC tariff;
- (5) because the Contract described in finding (4) is not a customer-specific electric service contract within the meaning of ComEd's Rate CTC tariff, IBT was not entitled to receive from ComEd customer-specific CTCs for all Contract facilities while the Contract was in effect[^]. In ^addition, the Contract is now expired and IBT's request for customer-specific CTCs for the Contract facilities is now therefore also moot;
- (6) IBT's request that ComEd begin factoring customer-specific CTCs into its billing to IBT under the Contract is now moot; moreover, the Contract does not contemplate the provision of unbundled electric services to IBT;
- (7) IBT's request for reparations based on the use of customer-specific CTCs under the Contract should be denied because the Contract does not contemplate the provision of unbundled electric services to IBT and because the Contract is not a CSESC;
- (8) the instant Complaint should be [^]denied [^]consistent with findings [^]herein;
- (9) any objections, motions or petitions filed in this proceeding which remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions contained herein.

Administrative Law Judges Proposed Order

IT IS THEREFORE ORDERED that the Complaint filed by Illinois Bell Telephone Company on January 30, 2001 against the Commonwealth Edison Company be, and is hereby, ^denied^ for the reasons set forth in the Findings and the prefatory portion of this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill.Adm.Code 200.880, this Order is final, and is not subject to the Administrative Review Act.

DATED:
BRIEFS ON EXCEPTIONS DUE:
REPLIES ON EXCEPTIONS DUE:

March 13, 2003
March 27, 2003
April 4, 2003

David Gilbert,
Administrative Law Judge